Supreme Court, U.S.
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No. 01-1028

IN THE

Supreme Court of the United States

CITY OF SAN ANTONIO and TEXAS TOWING CORPORATION,

Petitioners,

v.

BRENDA L. STUCKY, d/b/a Bill's Wrecker Service, and RICHARD VILLANEVA, d/b/a Creswell's 24 Hour Wrecker Service,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner, Texas Towing Corporation, is wholly owned by Miller Industries Incorporated, which is publicly traded.

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ARGUMENT

A. The Pendency of Other Cases Before this Court Involving Similar Issues Is Not a Basis for the Denial of Certiorari

Respondents' first proffered reason for denying the petition for writ of certiorari here is that this Court has already granted the petition in *Ours Garage & Wrecker Serv. v. City of Columbus*, 257 F.3d 506 (6th Cir. 2001), *cert. granted*, 122 S. Ct. 802 (2002) (No. 01-419), a case involving a similar analysis of the Federal Aviation Administration Authorization Act's preemptive effect. However, when other cases present similar issues, denial is not this Court's preferred course of action. Instead, this Court either grants more than one of the similar petitions or holds the remaining cases pending decision in the original. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) ("It is an important, recurring issue and is properly raised in another petition for certiorari being held pending disposition of this case"); *Keney v. New York*, 388 U.S. 440 (1967) (court held petition nearly two and a half years until decisions were rendered in other obscenity cases). Petitioners request the same relief here.

Respondents' argument is, in essence, that because the petition failed to arrive at this Court prior to the grant of certiorari in *Ours Garage*, due to circumstances largely beyond Petitioners' control, it should be denied. Ironically, Respondents want this Court to use the importance of the petition's issues, which have been recognized by virtue of the certiorari grant in *Ours Garage*, as a reason to *deny* review. This is the only argument Respondents have offered as a basis for denying certiorari on the issue of a state's ability to delegate its safety authority to municipalities under the Act. Respondents wholly failed to attack either the merits of the City's analysis of that issue or the reasons why this Court should exercise its review power. The petition should be granted or, at the very least, held until decision in the *Ours Garage* case.

B. Respondents Attempt to Artificially Narrow the "Municipal as Proprietor" Point in an Effort to Escape Warranted Review by this Court

1. The Various Conflicts and Importance of This Issue Call for Review

Respondents state in paragraph I of their Brief that, facts aside, the legal issues in this petition and in the *Ours Garage* case are the same, *i.e.*, those concerning the safety exception to the Act. Thus, Respondents urge the similarity of the legal issues as a basis for denying review. However, in the very next paragraph, Respondents lose the forest for the trees and claim that the municipal as proprietor exemption to preemption cannot be divorced from the facts of this particular case. As a result, they request that review be denied despite the singular legal thread running through this and other cases. Respondents also dismiss Petitioners' arguments as nothing more than a request to correct "perceived error." Without question, the "municipal as proprietor" point discusses the facts of this case, just as it points out the errors made by the Fifth Circuit below. But Respondents are wrong when they state that this case does not present issues that go beyond facts and error peculiar to this case.

In fact, Petitioners explained why the Fifth Circuit's analysis, while paying lip service to *Boston Harbor*, conflicted with the very foundation of the market participant exception to preemption. Though directed by this Court's precedent to do so, the Fifth Circuit failed to consider whether the City was acting in its own interest to address a specific proprietary problem, *i.e.*, eliminating the situations that arise from tow truck races to accident scenes that serve to make the City's job of maintaining order on public roads more difficult. The Fifth Circuit, in derogation of *Boston Harbor*, failed to ask whether the City's actions are an effort to regulate or merely the purchase of services required for the accomplishment of its tasks. *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island ("Boston Harbor")*, 507 U.S. 218, 227-33 (1993). Thus, Petitioners demonstrated a

conflict between the opinion below and this Court's precedent. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 687 (1986) (granting certiorari "[b]ecause the reasoning of the Kentucky Supreme Court is directly at odds with language in several of this Court's opinions").

Respondents argue that Petitioners have offered no conflict because they do not contend that *Stucky* directly conflicts with or abrogates *Boston Harbor*. Of course, the Fifth Circuit could not abrogate this Court's precedent; and Petitioners suspect that it is the rare case indeed where a lower court expressly acknowledges its departure from a binding Supreme Court decision. As a result, this Court has accepted jurisdiction when there is an "apparent" conflict between its decisions and those of lower courts. *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) ("We granted certiorari to resolve an apparent conflict with this Court's precedents and to clarify the law of sovereign immunity with respect to the collection of sales taxes on Indian lands"); *Hardin v. Straub*, 490 U.S. 536, 537 (1989) ("Because that holding appeared to conflict with our decision . . . , we granted certiorari").

Not only did Petitioners demonstrate a conflict with case law from this Court, but Petitioners also explained how the Fifth Circuit's *Stucky* opinion conflicted with the treatment by other circuit courts, as well as that by the Fifth Circuit in a prior opinion.[1] *Petrey v. City of Toledo*, 246 F.3d 548, 560-61 (6th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1050-51 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001); *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 544 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999). Again, Respondents fault the petition for not citing cases in "direct conflict with the holding in *Stucky*."

1. *See Scarborough v. United States*, 431 U.S. 563, 567 n.4 (1977) (granting certiorari in the face of a split among the circuits, which was accompanied by an intracircuit conflict).

However, this Court has granted certiorari in the event of an apparent conflict among circuit courts, as well. *International Broth. of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 855 (1987) ("Because the Eleventh Circuit's decision appeared to conflict with the decision of the Sixth Circuit . . . , we granted certiorari"); *United States v. National Bank of Commerce*, 472 U.S. 713, 719 (1985) ("Because the opinion of the Court of Appeals appeared to us to conflict, directly or in principle, with decisions of other Courts of Appeals, we granted certiorari").

The conflict here rests on how the circuit courts use the consent/nonconsent dichotomy to determine application of the market participant preemption exception and calls into question whether it should be the determining factor at all.[2] While it is true that the circuits have held that nonconsensual towing is exempted from preemption pursuant to the market participant doctrine, and that consensual towing is not, the circuits do not agree on where to divide that line and, in that way, conflict in their application of the *Boston Harbor* exception. *Stucky*, 260 F.3d at 434 n.11 (rejecting the notion that all tows from the scene of accidents on public ways are properly characterized as nonconsensual); *Petrey*, 246 F.3d at 558 (defining all police-ordered tows as nonconsensual); *Tocher*, 219 F.3d at 1049 (including within definition of "nonconsensual tows" those that concern "abandoned, disabled, stored or impounded vehicles from public or private property"); *Mayer*, 158 F.3d at 541 n.2 (defining nonconsensual towing services as occurring "when law enforcement or other local authorities determine that a vehicle must be towed and the owner of the vehicle is not afforded the opportunity to request towing services from a specific company"). Respondents seek to convince this Court that because the labels applied to the tows are consistent on

2. Petitioners would again point out Respondents' excessive focus on the facts, *i.e.*, that the petition should be denied because the Fifth Circuit's decisions do not conflict with those of other circuits where not all of them involved "towing from the scene of a collision." (*Brief in Opposition at 9*)

their face among the various circuit courts, the differences in the meanings ascribed to those labels should be overlooked.

Moreover, they imply that Petitioners simply want another appellate court to review the facts of this case and rule in the City's favor. However, Petitioners have presented a real conflict between the Fifth Circuit and both this Court's authority and decisions by other circuit courts. While this Court does not typically grant certiorari to review evidence and discuss specific facts, this Court does not reject review of important issues simply because the application of broader legal principles may require reference to that evidence and those facts. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 140 (2000) (granting certiorari to resolve conflict even though court's decision involved detailed discussion of evidentiary record); *Saenz v. Roe*, 526 U.S. 489, 498 (1999) ("we granted certiorari because of the importance of the case"); *Crawford-El v. Britton*, 523 U.S. 574, 584 (1998) (granting certiorari because of the importance of both the underlying issue and a correct understanding of Supreme Court precedent, "[d]espite the relative unimportance of the facts of this particular case"); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) (granting certiorari to resolve conflict, though particular case dealt with construction of New York statute).

Petitioners are not, contrary to Respondents' representations, asking this Court to resolve a factual dispute. Petitioners agree with Respondents that safety was the primary consideration behind the passage and enforcement of the single vendor system and related ordinances and that the City was attempting to address the issue of wreck chasing. Petitioners and Respondents simply disagree whether the City was acting in a proprietary manner in purchasing services to accomplish the functions entrusted to it, including keeping public roadways safe for all San Antonio travelers. The basis for granting certiorari is further fortified by the *Stucky* court's casual refusal to consider a Texas state statute on the issue, which had been

recently amended to prevent the definitional dichotomy used by the Fifth Circuit. *Stucky v. City of San Antonio*, 266 F.3d 342 (5th Cir. 2001); *see, e.g., C.I.R. v. Asphalt Products Co., Inc.*, 482 U.S. 117, 120 (1987) ("Because this holding is in apparent conflict with [a lower court decision], and is in obvious conflict with the plain language of the statute, we grant certiorari").

The application of the market participant preemption exception is of extreme importance, particularly given the malleable definitions the various circuits have employed in determining its application. Without review by this Court, any federal circuit court, when called upon to determine how far a federal towing statute can go in prohibiting local action, can simply categorize the tow as consensual. Such an approach is an unworkable implementation of federal law. There must be uniformity among the circuits on how the FAAAA applies. It makes no sense that under federal statutory law and federal preemption principles, a federal court in California can allow that which a federal court in Texas prohibits.

2. The *Stucky* Court Erred in its Application of the Market Participant Preemption Exemption

After its feeble justifications for denying review, Respondents turn to the merits of the market participant exemption and argue that the consent/nonconsent dichotomy must be employed because "it defines who the market actors are." But that conclusory assertion begs the question, where Petitioners have attacked the Fifth Circuit's consumer model as an inappropriate way to apply the *Boston Harbor* preemption exemption. Respondents next rationalize the Fifth Circuit's categorization of some tows as consensual and of others as nonconsensual. In doing so, they characterize certain of Petitioners' arguments as "ridiculous," quote extensively from the *Stucky* opinion itself, and give short shrift to the differences among the circuit courts.

What Respondents refuse to do is recognize that the contract at issue in this case extends only to City-authorized tows, *i.e.*,

a narrowly-defined area limited to vehicles that have been abandoned or involved in a collision and not affecting towing from private property. Respondents mock this distinction, stating that the only way consumers could have a choice is if they are involved in a collision on their own private property. This statement is patently inaccurate, and Petitioners never implied such a result. Respondents' extensive quote from *Stucky* also refuses to recognize the limited nature of the City's participation, particularly when the Fifth Circuit only a short time before held that a municipality acts in its own interests when it obtains towing services "to maintain traffic flow in the wake of an accident and remove abandoned vehicles blighting their environment." *Cardinal Towing*, 180 F.3d at 696.

Respondents characterize the *Stucky* court's holding as "logical," though the *Stucky* court itself expressed reservation. *Stucky v. City of San Antonio*, 260 F.3d at 437. The Fifth Circuit previously and every other circuit court to have addressed the issue have given a much broader meaning to nonconsensual tows that are free from the FAAAA's preemptive reach. Respondents fail to recognize the broad nature of the *Cardinal Towing* court's definition of nonconsensual tows, as well as the analytical underpinnings of that decision, and cite out of context section 19-391 of the San Antonio City Code in support of their desired meaning for consensual tows.

In *Cardinal Towing*, the Fifth Circuit actually rejected the consumer model, *i.e.*, looking only to whether the City or vehicle owner is the purchaser of the tow. 180 F.3d at 696. Instead, the Fifth Circuit focused on whether the City was acting in a proprietary capacity regarding the only tows that were at issue in that case, which the Fifth Circuit characterized as nonconsensual. *Id.* at 695-97. However, the definition of nonconsensual tows encompassed what Respondents would characterize as consensual tows, *i.e.*, situations in which the vehicle owner would like to make a choice, but is prohibited

from doing so. *Id.* at 694-96; BEDFORD, TEX., MUN. CODE § 126-156 ("Regardless of [the definition of nonconsent tow], certified law enforcement officials may control the scene of an accident in the manner they deem appropriate"). Moreover, the Fifth Circuit stated the respective cities' purposes behind the challenged ordinances in both *Cardinal Towing* and *Stucky* in nearly identical terms. *Cardinal Towing*, 180 F.3d at 696; *Stucky*, 260 F.3d at 438. While the purpose supported a proprietary intent in *Cardinal Towing*, Respondents would have this Court accept that the same purpose supported a regulatory intent in *Stucky* because the *Stucky* ordinances encompassed a minimal amount of what they term consensual tows.[3]

Respondents also try to minimize the distinctions between *Stucky* and other circuit court decisions in their consent/nonconsent dichotomy. They focus only on the definition of "consensual" tows in *Mayer* and link the definitions in *Petrey* and *Tocher* solely to a rotation list. In spite of those efforts, the distinctions remain. While the *Mayer* court defined consensual tows as when a vehicle owner privately contracts with a towing company, it excluded from the definition situations in which the owner of the vehicle is not afforded the opportunity to request towing services from a specific company. 158 F.3d 541 & n.2. And the broad definitions used by the *Petrey* and *Tocher* courts for nonconsensual tows did not hinge upon the existence of a rotation list. The *Petrey* court, in determining whether the City's towing provisions were an attempt to regulate the towing industry as a whole and thus preempted, decided against preemption because the towing provisions dealt exclusively with police-ordered tows. *Petrey*, 246 F.3d at 558. The *Tocher* court

3. Respondents' discussion of section 19-391(c) is similarly misleading. The quoted portion is not an indication that the City defines consent tows as those where the vehicle owner is available and willing to make a choice and, thus, protect them from City action; instead, the provision when read in context demonstrates that the City was attempting to protect consumers from the tow truck operators themselves.

held that nonconsensual tows included those of "abandoned, disabled, stored or impounded vehicles from public or private property." 219 F.3d at 1049. In both cases, the courts held that the method by which the City contracts, *i.e.*, through a rotational list or a single vendor system as in *Cardinal Towing*, was irrelevant to the preemption determination. *Petrey*, 246 F.3d at 557-58; *Tocher*, 219 F.3d at 1049-50.

CONCLUSION

Given the conflicts present in this case — conflicts between the *Stucky* opinion and this Court's precedent, decisions from other circuit courts, a prior decision of the Fifth Circuit itself, and Texas statutory language — and the importance of the preemption issues involved, this case is appropriate for review. For the foregoing reasons, this Court should grant the petition for writ of certiorari and reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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